IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1387

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM,
Petitioner,

v.

DAVID R. MERRILL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a federal agency may, without specific statutory authority, choose to delay public disclosure of its final policy decisions despite the fact that the Freedom of Information Act requires that policy decisions be disclosed promptly?

STATUTE INVOLVED

5 U.S.C. § 552(a)

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying-

* * *

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register . . .

* * *

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing.

* * *

(4)

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the

court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its actions.

SUMMARY OF ARGUMENT

I. A. The Freedom of Information Act ("FOIA" or the "Act") requires each federal agency "promptly" to make available to the public those "statements of policy" which it has "adopted". 5 U.S.C. § 552(a)(1) and (2)(1976). Petitioner Federal Open Market Committee ("FOMC") does not dispute that it is an "agency" and that the records at issue are statements of its policies described in this portion of the Act.

Nor does petitioner claim that its monthly policy directives and tolerance ranges are permanently exempt from disclosure. Instead, petitioner argues that Exemption 5 of the FOIA allows it to delay disclosing the requested records, even though it can point to no part of that exemption, or any other provision of the Act, expressly authorizing deferral of publication. Exemption 5, it asserts, authorizes it to defer publication of its monthly policy statements until a few days after the next monthly statement is adopted. Thus, FOMC's position is that Exemption 5 authorizes it to delay making its policy statements available to the public until they are no longer in effect.

Petitioner's argument ignores the carefully structured provisions of the FOIA, which require that material either be made immediately available or, as long as it remains within one of the nine specific exemptions, need never be disclosed. The FOIA does not provide any mechanism by which an agency may avoid the prompt publication requirement and

defer publication of documents which are not exempt from disclosure. Petitioner's argument ignores not only the plain language of the FOIA, but also the decisions of this Court which have held that the purpose of Exemption 5 is to protect the decisionmaking process by preserving open and frank discussions within agencies. National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975). Although petitioner agrees that the records at issue are not predecisional and are not deliberative communications but, rather, constitute the agency's final policy decisions, petitioner still contends that Exemption 5 applies to the records at issue. Thus FOMC's argument is squarely contrary to this Court's interpretation of Exemption 5. Moreover, in Sears this Court warned that it would be "reluctant" to construe Exemption 5 to apply to policy decisions. 421 U.S. at 153. Thus petitioner has a doubly heavy burden in arguing that Exemption 5 covers these records: in addition to the general burden of proof imposed upon it by the Act itself, 5 U.S.C. § 552(a)(4)(B)(1976), it must also carry the further burden imposed upon it by this Court's "reluctance" to extend Exemption 5 to the particular type of records at issue here.

B. Petitioner's argument based on the legislative history of the FOIA was expressly rejected by the court of appeals below which unanimously found that the legislative history did not "indicate that a statement of agency policy may be withheld subsequent to the date it becomes effective." Petition

for Cert. 12A. Petitioner is unable to show that Congress intended to allow deferral of FOMC decisions and produces no evidence that Exemption 5 was designed to protect the requested records. Petitioner misconstrues Exemption 5 when it expresses fear that unless the judgment below is reversed agencies will have to disclose their most secret plans, including prices to be paid in acquiring or disposing of property, since such plans do not constitute statements of an agency's policies.

C. The FOMC also argues that there are three privileges which would permit delay of routine discovery in civil litigation of the records at issue, and hence, that those records are covered by Exemption 5. None of these privileges is applicable here.

First, petitioner claims an executive privilege for official government information whose disclosure would be harmful to the public interest and cites several cases discussing that privilege. Pet. Br. 34. But those cases involve situations in which discovery was sought of witnesses' statements given in return for a promise of confidentiality which, if breached, would lessen the government's ability to obtain vital information from private sources. Executive privilege simply does not apply to the instant records because disclosure here is sought of final policy decisions, not facts obtained in confidence. Petitioner's argument that prompt disclosure of its policy statements would adversely affect the public in-

terest amounts to an assertion that the courts have discretion, where "secrecy in the public interest" is considered necessary, to authorize withholding of policy records. Congress expressly rejected this approach in adopting the FOIA in 1966, as this Court held in Environmental Protection Agency v. Mink, 410 U.S. 73, 79 (1973).

Second, petitioner argues that Exemption 5 encompasses a privilege for "confidential . . . commercial information", citing Fed. R. Civ. P. 26(c)(7). Pet. Br. 35. Petitioner cites no cases where information generated by the government falls within this privilege. Moreover, the records at issue are not "commercial information" but policy statements. In any event, even if the documents at issue here did contain "commercial" information, Congress did not intend Exemption 5 to apply to such information, since it specifically included exemptions for commercial and financial information in Exemptions 4 and 8. Petitioner does not claim those exemptions apply to the records at issue.

Third, the FOMC, citing Fed. R. Civ. P. 26(c)(2), states that district courts have power to issue protective orders delaying discovery and that this power would apply to its domestic policy statements. The cases cited by petitioner authorized delay of disclosures in the circumstances cited but in none did the courts delay or refuse discovery of an agency's statements of its policy.

II. Petitioner's real argument is not based on the words of the Freedom of Information Act nor on the decisions of this Court interpreting that Act; rather it is based on the FOMC's view that effective implementation of its policies requires less than prompt publication of its policy statements. But many market analysts disagree with the FOMC position favoring delayed disclosure and believe that prompt publication will serve the public interest.

This Court need not choose, however, between the opinions expressed by the FOMC members and monetary experts outside the agency. The disagreement serves to emphasize the wisdom of Congress in phrasing the exemptions in the FOIA so as to minimize the extent to which the courts must balance competing policy arguments. The proper place for petitioner to make its case for delay in prompt publication of its policy statements is in the Congress. As the Court below suggested (Petition for Cert. 18A), it is the "function of the legislature, not the court" to enact "a specific statutory authority for deferral . . . from the prompt availability requirement" of the FOIA.

Following the decision of the court below, legislation was introduced in the Congress which provides for deferring publication of FOMC policy decisions. Should Congress be persuaded by the FOMC's contention that prompt disclosure of its policy decisions would prevent it from functioning effectively, Congress can by statute authorize the FOMC to delay

publication of its policies. Absent such a finding by Congress, the unequivocal language of the FOIA requires the FOMC to publish its policy decisions promptly after they are made.

ARGUMENT

I. THE FREEDOM OF INFORMATION ACT REQUIRES DISCLOSURE OF DOMESTIC POLICY DIRECTIVES AND TOLERANCE RANGES PROMPTLY AFTER THEY ARE ADOPTED.

A. Exemption 5 Of The FOIA Does Not Authorize Deferred Release Of Final Policy Statements.

The Freedom of Information Act requires each Federal agency "promptly" to make available to the public those "statements of policy" which it has adopted. 5 U.S.C. § 552(a)(1) and (2)(1976). These statements may be made available either by "currently" publishing them in the Federal Register or by permitting members of the public to inspect and copy them, or by having them "promptly" published and copies offered for sale. 5 U.S.C. § 552(a)(1) and (2)(1976); (emphasis added). There appears to be no dispute that the records at issue are statements of policy as described in subsection (a)(2) of the statute. Both courts below so held explicitly and the Federal Open Market Committee does not challenge that portion of the lower courts' opinions.

Since the requested records are agreed to be "policy statements", the FOMC must show, if it is to avoid the

requirement of prompt publication, that the FOIA either permanently exempts the requested records from any disclosure requirement or that it permits deferral of publication. The FOMC does not contend, however, that the records are completely exempted from disclosure. Nor does it contend that any part of the Act expressly allows it to defer publication. 1/ Rather, it is the FOMC's position that Exemption 5 provides implied, not explicit, authority to withhold publication of its policy statements for a limited period of time. This argument ignores both the plain language of the FOIA and this Court's decisions concerning Exemption 5.

In reading the FOIA, it is clear that the FOMC's position disregards the structural scheme of the statute, which does not contemplate any delay in the release of non-exempt documents; a record must either be released promptly or,

1/ The only expressed limitation on the command of Section 552(a) of the FOIA that all of an agency's policy statements be made available to the public promptly is in Subsection (a)(2). That subsection permits an agency, "to prevent a clearly unwarranted invasion of personal privacy", to "delete identifying details when it . . . publishes a(n) . . . statement of policy." The scheme of the FOIA is internally logical. If Congress had intended to permit any exceptions to the statutory command of prompt availability, the logical place to put it would have been in Subsection (a)(2). Yet Congress included no authorization for delay in making statements of policy available.

as long as it remains within one of the nine specific exemptions, need never be released at all. 2/ What the FOMC seeks is to delay publication of its Domestic Policy Directives and tolerance ranges until "a few days" after the next monthly meeting of the FOMC at which new policy directives are adopted. Pet. Br. 10, 12. By not releasing the documents until after they are no longer in effect and thus no longer final statements of agency policy, the FOMC is not merely seeking to delay but rather to permanently exempt its policy statements from disclosure. The FOMC's offer to release documents which no longer constitute "statements of policy" at all is plainly inconsistent with the specific requirements of the FOIA.

2/ The only means by which a delay in publication might ever be authorized would be through the enactment of a statute meeting the requirements of Exemption 3 and authorizing the withholding of records for a specified time. The court in Aviation Consumer Action Project v. Civil Aeronautics Board, 418 F. Supp. 634, 637 (D.D.C. 1976) found that there was a statutory basis, separate from the FOIA, for an Executive Order requiring the CAB to defer publication of certain material for 5 days. The situation in Aviation Consumer Action in which deferral was allowed by statute must be distinguished from that in this case in which the only authorization for deferral is provided by the petitioner's own regulation (12 C.F.R. § 271.5(1978)).

The FOMC's position concerning Exemption 5 is inconsistent not only with the plain language of the FOIA, but also with this Court's holdings concerning that provision of the FOIA. By its terms, Exemption 5 exempts from disclosure those records 3/ "which would not be available by law to a party other than an agency in litigation with the agency." Thus, Exemption 5 entitles the public to all those agency records that a private party could discover in litigation with the agency. Environmental Protection Agency v. Mink, 410 U.S. 73, 85-86 (1963). The purpose of Exemption 5 is to protect the decisionmaking process by preserving open and frank discussions within agencies which otherwise could be inhibited if all internal agency memoranda were subject to disclosure. National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

In its opinion in Sears this Court explicitly warned that it would be "reluctant" to construe Exemption 5 to apply to policy decisions of the type described in 5 U.S.C. § 552(a)(2)(1976), which are precisely the type of policy decisions at issue in this case. National Labor Relations Board v. Sears, Roebuck & Co.,

3/ The words of the exemption apply only to "memorandums or letters" but the courts appear to have interpreted the exemption so as to apply to all types of documents. See, e.g., National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975).

supra at 153. Thus, petitioner, which has the burden of showing the records sought are exempt, 5 U.S.C. § 552(a)(4)(B)(1976), 4/ has a particularly heavy burden in this case, since it must overcome the reluctance of this Court to hold that statements of agency policy are within Exemption 5.

The Court explained in its opinion in Sears the reasons for its reluctance to construe Exemption 5 as exempting any records of agency policy statements. After quoting Professor Davis' conclusion that Exemption 5 requires the disclosure of an agency's effective law and policy, this Court continued:

> This conclusion is powerfully supported by the other provisions of the Act. The affirmative portion of the Act, expressly requiring indexing of "final opinions", "statements of policy and interpretations which have been adopted by the agency", and "instructions to staff that affect a member of the public," 5 U.S.C. § 552(a)(2), represents a strong congressional aversion to "secret (agency) law," Davis,

4/ Petitioner, doubtless inadvertently, failed to include this provi-
(footnote continued on page 15)

> supra, at 797; and represents an affirmative congressional purpose to require disclosure of documents which have "the force and effect of law." H.R. Rep. No. 1497, p. 7. We should be reluctant, therefore, to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2); . . .

National Labor Relations Board v. Sears, Roebuck & Co., supra at 153.

To be sure, in Sears this Court was dealing with final agency legal opinions and in this case it is dealing with final agency economic policies. However, that distinction is not relevant in determining the applicability of Exemption 5, in view of the fact that the statute makes no distinction based on the particular subject matter of the policy statements which are required to be released. 5 U.S.C. § 552(a)(2)(1976). Petitioner's argument that Exemption 5 contains an implied right to delay the release of its policy statements is thus contradicted both by this Court's opinion in Sears and by the unambiguous language of the Freedom of Information Act.

(footnote continued from page 14)
sion of the Act in its presentation of the statutes involved. See Pet. Br. 2-3 and supra 2-3.

B. The Legislative History Of The FOIA Does Not Support The Theory That Exemption 5 Authorizes Deferred Disclosures

Finding no support in the language of the Act or court decisions, petitioner's argument is reduced to the proposition that the legislative history of Exemption 5 demonstrates a congressional intent to permit any agency to defer public disclosure of any of its policy statements if prompt release "would adversely affect its operations." Pet. Br. 26. Contrary to the Federal Open Market Committee's interpretation, the legislative history does not support the deferred disclosure theory. Petitioner's reliance on two passages from the House Report and one from the Senate Report accompanying the bill that became the Freedom of Information Act is misplaced. Pet. Br. 25-26. The first quotation from the House Report does not support the petitioner's position because it is taken from a paragraph which discusses the need to protect the agency's internal management procedures, not its statements of policy. 5/ The second quotation from the House Report cited by petitioner

5/ The complete paragraph reads: "Matters which relate solely to 'internal management' and thus can be withheld under the provisions of 5 U.S.C. 1002 range from the important to the insig-
(footnote continued on page 17)

interpreting Exemption 5 also fails to lend support to the deferred disclosure argument. When read in context, the quoted passage simply indicates that the House Committee viewed Exemption 5 as protecting pre-decisional material,

(footnote continued from page 16)

nificant. They range from a proposed spending program, still being worked out in the agency for future presentation to the Congress, to a routine telephone book. In 1961, for example, the Secretary of the Navy ruled that 'telephone directories fall in the category of information relating to the internal management of the Navy,' and he cited 5 U.S.C. 1002 as his authority for this ruling. (footnote omitted). On the other hand, [in some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented, particularly plans relating to expenditures, could have adverse effects upon both public and private interests. Indeed, there may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to such interests. There may be legitimate reasons for nondisclosure, and S. 1160 is designed to permit nondisclosure in such cases."] H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6 (1966)(footnote omitted). Petitioner quoted only the section above which appears in brackets.

not final conclusions. 6/ Similarly, the portion of the Senate Report quoted by petitioner cannot be viewed as a discussion of the deferred disclosure theory, much less an endorsement of the theory. Pet. Br. 26. Instead, the Senate Report's discussion of Exemption 5 concentrates on responding to the agencies' fear that the Freedom of Information Act would make it "impossible to have any frank discussion of

6/ The passage states: "Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.' Moreover, [a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy.] S. 1160 exempts from disclosure material 'which would not be available by law to a private party in litigation with the agency.' Thus any internal memorandums which would routinely be disclosed to a private
(footnote continued on page 19)

legal or policy matters." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added). Thus, this language, like the language quoted from the House Report, demonstrates only that the fifth exemption was designed to protect predecisional material, not the decision or policy itself. The Senate Report language quoted by petitioner indicates that the Committee recognized the problems which might be created by the FOIA, but felt that the advantages to be gained from a more open government outweighed these problems. In the rare instances where the Committee did not find those advantages to outweigh any potential problems, specific exemptions were allowed by the statute.

All three passages quoted by petitioner are so general as to have caused the court of appeals below to characterize the Federal Open Market Committee's argument as based on "[a]mbiguous inferences from legislative history." Petition for Cert. 14A. Moreover, as explained above, none of the passages quoted applies to statements of the agency's policy after that policy has been adopted in final form and becomes effective. In the words of the court of appeals:

(footnote continued from page 18)
party through the discovery process in litigation with the agency would be available to the general public." H.R. Rep. No. 1497 89th Cong., 2d Sess. 10 (1966) (emphasis added). The portion of the paragraph quoted by petitioner appears in brackets.

> We cannot infer from this language that Congress contemplated that final policy decision (sic) such as the one at issue here could be kept secret until executed. The policy directives are "issued" to the Account Manager upon adoption, and they become immediately effective and govern his open-market transactions. The House Report does not indicate that a statement of agency policy may be withheld subsequent to the date it becomes effective.

Petition for Cert. 14A. (footnote omitted).

As petitioner notes, a representative of the Treasury Department, in testifying on the Freedom of Information Act in 1965, referred to the consequences, adverse in his view, of requiring premature disclosure of "purchases by the Federal Reserve System, for example, of Government securities in the market." Pet. Br. 24. The Treasury Department used this argument as evidence of the need for including a general exemption in the FOIA similar to the "in the public interest" language of the Administrative Procedure Act and the Treasury Department regulations in

force in 1965. Hearings on H.R. 5012, etc. Before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. 49 (1965). Apparently, Congress was not persuaded by the Treasury Department's argument, for the FOIA does not include a general exemption provision. 7/ Petitioner therefore can not rely upon the Treasury Department testimony to support its argument that this Court should now engraft upon the Act a provision allowing deferred disclosure.

During the same testimony a discussion between Congressman Griffin and the Treasury Department's Acting General Counsel alerted the Subcommittee to a situation analogous to that in the case at hand. Congressman Griffin noted that under the Freedom of Information Act the Government would no longer be able to defer disclosures of information concerning the United States' gold

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7/ The House Report accompanying the Freedom of Information Act discussed the abuse of the general "in the public interest test" and explained the need for specific, not general, exemptions. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-7 (1966). Similarly, the Senate Report attacked the general withholding exemption as contrary to the policy of full disclosure. S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

purchases unless the information was protected by one of the specific exemptions. Hearings on H.R. 5012, etc. Before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. 70 (1965). In discussing particular exemptions which might allow the government to withhold information relating to such gold purchases, the Treasury Department representative did not discuss or question Exemption 5. Id. at 51-56. Thus, contrary to the FOMC's unsupported assertion that Exemption 5 was adopted, in part, in response to the Treasury Department's concerns regarding premature disclosure, the complete absence of Treasury comment on this exemption indicates that the Treasury Department did not even inform the Subcommittee of any possible application of Exemption 5 to disclosure of policy decisions, let alone inspire any changes in the Act. 8/ Nor did the Federal Reserve Board itself mention the need for deferred disclosures or problems in Exemption 5 in its correspondence commenting on the original Freedom of Information legislation. See Hearings on H.R. 5012, etc. Before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. 247 (1965).

Petitioner also points to testimony in which representatives of various federal agencies expressed concern that

8/ See opinion of the court of appeals below. Petition for Cert. 14A, n. 18.

the Act would require agencies to disclose plans to acquire or dispose of real estate or other property, the prices at which agencies expected to buy or sell materials, etc. Pet. Br. at 23-24. These matters are not involved in this case. We are dealing with an agency's final policy statements and not with the daily conduct of an agency's housekeeping affairs. For example, if the General Services Administration adopted a general policy of not constructing federal office buildings in areas where construction would require destruction of existing housing, the Freedom of Information Act, we submit, would require that the policy statement be made available to the public. On the other hand, GSA's decision to acquire specific real estate and the price ranges it expected to pay, even if reduced to writing, could hardly be characterized as statements of agency policy, and accordingly would not be affected by the decision in this case.

The legislative history of the 1974 amendments to the Freedom of Information Act further weakens the deferred disclosure theory. Congress viewed agency delays in responding as a major problem requiring immediate correction. Speaking in support of the 1974 amendments, Congressman Thone said, "Information is only available if it is timely." 120 Cong. Rec. 6,810 (1974). Senator Hruska, speaking in favor of the bill as reported, pointed

out that time limits on agency responses are crucial and must be short enough to avoid delays to the requester. 120 Cong. Rec. 17,021 (1974). Thus, the thrust of the 1974 amendments was to speed up disclosure, rather than delay it.

In sum, the legislative history of neither the original Freedom of Information Act nor the 1974 amendments supports the deferred disclosure theory. Indeed, the theory urged by the FOMC here is an attempt to overturn a specific congressional disavowal of a general exemption, to be applied whenever the agency wishes to argue that disclosure is not "in the public interest." Rather than supporting the agency's right to defer disclosure, the legislative history emphasizes the importance of the Freedom of Information Act's prompt, broad disclosure requirements and the narrowness of the tightly drawn exemptions which are inapplicable in this case.

C. There Are No Privileges That Would Exempt The Records At Issue From Discovery In A Civil Proceeding

In addition to its argument based on the legislative history of Exemption 5, petitioner asserts that there are "three privileges" which "would allow a district court in a civil proceeding to delay routine discovery of documents such as the Domestic Policy Directive and tolerance ranges until

they were no longer operative." Pet. Br. 33. We consider each of these asserted privileges and show that none is applicable.

First, the FOMC relies on an asserted "privilege for official government information whose disclosure would be harmful to the public interest" "in addition to the government's privilege for military and state secrets." Pet. Br. 34. 9/ To support its position the FOMC cites three court of appeals decisions: Machin v. Zuckert, 316 F.2d 336, 339 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963); Brockway v. Department of the Air Force, 518 F.2d 1184, 1194 (8th Cir. 1975); Cooper v. Department of the Navy, 558 F.2d 274, 277 (5th Cir., 1977).

In all three cases plaintiffs sought access to government reports made in the course of an accident investigation, and the decisions in all three cases rest on a government privilege attaching to statements obtained from private citizens on a promise of confidentiality. In Machin, the court upheld a claim of privilege by the Secretary of the Air Force for witness statements given to an Air Force accident investigation board. The court said:

9/ We agree, of course, that Exemption 1 of the FOIA clearly exempts records relating to "national defense and foreign policy" but these are not involved in this case.

> We agree with the Government that when disclosure of investigatory reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program and perhaps even . . . impair the national security . . . the reports should be considered privileged.

316 F.2d at 339.

In Brockway, the court relied on possible impairment of "the deliberative processes of the Air Force" in finding that Exemption 5 authorized withholding the statements. 518 F.2d at 1194. In Cooper, the court cited both Machin and Brockway and noted that in "an aircraft accident investigation, assurances of confidentiality may be especially needed to obtain full disclosures." 558 F.2d at 227.

We submit that the court below correctly distinguished these cases when it noted:

> The privilege for witnesses . . . cannot be extended to reach the instant situation, because neither the fact-gathering ability nor the decision-

> making process of FOMC would be undercut by disclosures of these final policy decisions.

Petition for Cert. 16A-17A.

The FOMC's reliance on a privilege relating to the protection of witnesses is therefore completely inappropriate here. Essentially, the FOMC's argument with respect to the first asserted "privilege" is nothing more than a claim that the agency should be able to withhold information whenever it believes disclosure is not "in the public interest." That argument is plainly an attempt to substitute the judgment of the agency for that of the Congress when it enacted the FOIA. That Act contains its own measures of the disclosures that would be harmful to the public interest. As this Court pointed out in its first opinion interpreting the Act, Congress, in adopting the FOIA, rejected the provision in the former public disclosure statute (5 U.S.C. § 1002, 1964 ed.) of maintaining secrecy where required "in the public interest." See Environmental Protection Agency v. Mink, 410 U.S. 73, 79 (1973). 10/

10/ As the court below put it, "This argument runs counter to Congress' express rejection of the public interest standard in favor of the broad disclosure policy embodied in the FOIA." Pet. App. 16A, n. 22.

We had supposed it to be clear that Congress had relieved the agencies and the courts of the necessity of considering the economic impact of compliance with the Act's disclosure commands. See Environmental Protection Agency v. Mink, 410 U.S 73, 80 (1973), quoting S. Rep. No. 8 3, 89th Cong., 1st Sess. 3 (1965). One difficulty in relying on an agency's conclusions as to the duration of the adverse economic consequences of disclosures is aptly illustrated by the history of the Federal Reserve Board's regulation shielding the records at issue here. 12 C.F.R. § 271.5 (1978). Prior to 1967, the records were published only annually; in mid-1967, after the Freedom of Information Act took effect on July 4, 1967, the agency delayed their publication for approximately ninety days. Petition for Cert. 38A, and 5A, n. 7. On March 24, 1975, after plaintiff wrote to the Board seeking the records at issue (Pet. Appendix 13) FOMC shortened the delay to 45 days. 40 Fed. Reg. 13,204 (1975). And again, after the opinion of the district court in this case, the period of delay was changed once again to "a few days" after the monthly meeting of the FOMC following the adoption of the Domestic Policy Directive and tolerance ranges. 41 Fed. Reg. 22,261 (1976). This history confirms the congressional observations that an agency's own assessment of the need for secrecy is bound to err in favor of nondisclosure. See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 4-5 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 3-5 (1965).

Petitioner also claims a second privilege, subsumed within Exemption 5, for "confidential . . . commercial information," relying on Fed. R. Civ. P. 26(c)(7). Pet. Br. 35. As the court below pointed out, the FOMC failed to "present a single case where information generated by government fell within this privilege." Petition for Cert. 17A. But beyond the lack of judicial authority for petitioner's position is the fact that it distorts the accepted meaning of words to describe the Domestic Policy Directive of the Federal Open Market Committee of the Federal Reserve System as "commercial". If that policy statement is commercial then the Annual Budget of the President could just as easily be called "commercial information." Even if the information at issue here were arguably "commercial" in nature, petitioner cannot claim that information is exempted from disclosure by the general language contained in Exemption 5 since Congress specifically addressed the exemption of commercial and financial information in Exemptions 4 and 8 of the FOIA. In Exemption 4 Congress exempted "privileged or confidential" commercial or financial information but only if the information had been obtained by an agency from non-governmental sources, 5 U.S.C. § 552(b)(4)(1976), thus ex-

cluding from the exemption such information obtained from another agency or generated by the agency itself. In Exemption 8, Congress exempted agency records relating to the financial condition of banks and other "financial institutions." This Court has recently described the nine exemptions as having been "carefully structured" by Congress. National Labor Relations Board v. Robbins Tire & Rubber Co., 98 Sup. Ct. 2311, 2316 (1978). It mocks that careful structure to argue, as petitioner does, that Exemption 5 also exempts "commercial" information.

In sum, we submit that the records at issue contain no "commercial" information, and if, contrary to our position, those records do contain such information, they are not exempt from prompt public inspection because the information was not obtained from non-governmental sources and does not relate to the financial condition of banks or similar institutions. Beyond this, we invite the Court to examine an example of the records at issue (see Pet. Appendix 60); we believe that examination will confirm that those records contain policies of the agency rather than "commercial information."

Finally, the FOMC asserts a third privilege, arguing that Fed. R. Civ. P. 26(c)(2) empowers the district court to issue protective orders delaying disclosure of the Domestic Policy Directive. Pet. Br. 36-37. Petitioner cites,

as containing examples of such protective orders, Brennan v. Local No. 639, International Brotherhood of Teamsters, 494 F.2d 1092, 1100 (1974), aff'd in part, rev'd in part on other grounds sub nom., Usery v. Local No. 639, International Brotherhood of Teamsters, 543 F.2d 369 (D.C. Cir. 1976), cert. denied, 429 U.S. 1123 (1977); and Campbell v. Eastland, 307 F.2d 478, 487-88 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963).

We submit that these cases are irrelevant here. In Brennan, supra 494 F.2d 1092, the Secretary of Labor sued to set aside an election of union officers and moved for summary judgment. The district court entered an order preventing the defendants from obtaining discovery against the Secretary until five days after the summary judgment motion was decided. The court of appeals upheld the district court's grant of summary judgment and found that the protective order was within the district court's discretion and did not prejudice the union, since discovery would not be needed unless the union could withstand the motion for summary judgment. Brennan, supra at 1100. Campbell involved a taxpayer who sued for a refund and obtained a district court discovery order against the government to produce reports of agents who had investigated the plaintiff for tax fraud. The court of appeals held that it was error to permit the taxpayer his discovery while

criminal proceedings against him were imminent. The court said that the discovery order

> was an open invitation to taxpayers under criminal investigation to subvert the civil rules into a device for obtaining pre-trial discovery against the Government in criminal proceedings.

307 F.2d at 488. 11/

Thus, the FOMC has not cited a single case in which a court, either under the Federal Rules of Civil Procedure or under the Freedom of Information Act, has delayed or refused discovery of a federal agency's written statements of its policy. By relying on cases such as Brennan and Campbell, petitioner would use Fed. R. Civ. P. 26(c)(2) to establish a principle that, in any case in which an agency has determined that delay is advisable to prevent a serious impediment to its functioning, Exemption 5 overrides the FOIA's clear command that statements of agency policy not otherwise exempt from disclosure be made promptly available.

11/ Campbell did not arise under the FOIA; if it had, the Government would have successfully interposed Exemption 7. See National Labor Relations Board v. Robbins Tire & Rubber Co., 98 Sup. Ct. 2311, 2314 (1978).

Such a broad interpretation of Exemption 5 would expand that provision to swallow up the Act's specific requirement in subsection (a) for prompt disclosure of each agency's policy statements and final opinions. We respectfully submit this Court should not adopt an interpretation of the FOIA so plainly inconsistent with the intention of Congress.

II. DISAGREEMENT AMONG EXPERTS REGARDING THE WISDOM OF PROMPT DISCLOSURE OF FOMC POLICY DOES NOT ALTER THE FOIA REQUIREMENT THAT POLICY DECISIONS BE PROMPTLY DISCLOSED

In the preceding section we have shown that the language of the Act, as interpreted by this Court, requires that the records at issue be disclosed promptly after their adoption and that Exemption 5 does not allow a delay in publishing the records. Petitioner's real argument is not based on the words of the Act at all. Rather, it is based on the FOMC's view, expressed in affidavits filed in the district court, that effective implementation of the agency's policy requires delayed publication of the records at issue. 12/ In this section

12/ Repeatedly in its brief, petitioner refers to "unanswered" affidavits filed by petitioner in the district court. See, e.g., Pet. Br. 26 Respondent did

(footnote continued on page 34)

we shall show that, in the view of many experts outside the agency, delay in making the Domestic Police Directive available, far from being clearly necessary, is unwise. Those experts believe, contrary to FOMC's position, that prompt publication will not defeat implementation of FOMC policies but rather will serve to implement the public interest by minimizing the advantage now enjoyed by market specialists. In presenting the considerations which favor prompt disclosure we seek only to inform the Court that there is considerable public controversy among the experts whether immediate publication of FOMC policy decisions is in the public interest. We respectfully submit that, although we do not think it is necessary for this Court to resolve the conflict in opinions between the FOMC and experts outside that agency, the Court should be informed of the nature of the arguments on both sides.

For example, Sherman Maisel, a member of the Federal Reserve Board and hence, an ex officio member of its Open Market Committee, from 1965 to 1972, has published a book in which among other topics he discussed the arguments for and against prompt publication of the agency's policies. We set forth below an extract from that discussion:

(footnote continued from page 33)
not "answer" the affidavits because he believed them irrelevant and both courts below agreed.

> Another argument put forth [by the Federal Reserve Board] against announcement of policy changes is that if the Fed is too specific it may enable individuals and firms to profit at the expense of the general public. Vast sums of money move through security markets. Federal Reserve policies, when announced explicitly, would not mean much to the average citizen. Only specialists could interpret them, thus increasing their profits inordinately. Most experts on markets, however, would take the opposite position. They believe that the better the information, the better the market. Under the present system, market experts can profit from the delay in releasing information. Hidden information is valuable to people in the market, and they can afford to spend a lot to obtain it. Their information systems, based

on a continous study of Federal Reserve operations and statements, are good. They can afford to search out special insights (a careless phrase in conversation can be valuable). After those inside the market have profited from their knowledge, they make it available to customers and eventually to the public. Of course, they may make mistakes in their reading of the Federal Reserve, but, on the whole, many do make considerable profit at the expense of those less intimately involved in day-to-day government security operations. [emphasis added].

Sherman Maisel, Managing the Dollar, 174-175 (1973).

Former Governor Maisel does not stand alone in the views we have just quoted; several prominent bankers and economists share his opinions concerning the adverse consequences of failure to make the records at issue here promptly available to the public.

Last year the Subcommittee of Domestic Monetary Policy of the House Committee on Banking, Finance and Urban Affairs held hearings on a bill (H.R. 9465) to require that detailed minutes of the FOMC meetings be kept and released to the general public three years after the meetings are held. Introduction of the bill was triggered by the FOMC action in May 1976, following by about two months the decision of the district court in this case, to discontinue preparation of its Memoranda of Discussion which included detailed accounts of the FOMC meetings. Petition for Cert. 5A n. 6. 13/ See Hearings on H.R. 9465 and H.R. 9589 Before the Subcommittee on Domestic Monetary Policy of the House Committee on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. (1977)(hereinafter referred to as "Hearings").

Prior to the Hearings, the House subcommittee solicited the views of business leaders and professors on H.R. 9465. Many of the experts who responded on the question as to the Memoranda of Discussion also offered opinions on the advisability of releasing the records at issue in this case promptly after their adoption. See Hearings at 202, 204, 225, 252, 270, 279, 299. For example Professor

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13/ Although originally plaintiff had sought access to the Memoranda of Discussion (see Pet. Appendix,
(footnote continued on page 38)

Milton Friedman of the University of Chicago wrote:

> May I say also that I have long been in favor of the immediate release of the records of policy actions of the FOMC. I have recommended repeatedly in testimony to Congress that the FOMC meetings be held on a Friday so that the record of policy actions can be written . . . and then released not later than Sunday night so that no business days pass without this record being available.

Hearings at 202. 14/

Mr. Beryl W. Sprinkel, Vice President and Economist of the Harris Bank, urged that "a summary of the FOMC's action be released immediately." He added:

(footnote continued from page 37)
13) the applicability of the FOIA to these Memoranda is no longer at issue in this case. See Petition for Cert. 6A n. 8.

14/ Professor Anna J. Schwartz of the National Bureau of Economic Research,
(footnote continued on page 39)

> I continue to believe that such knowledge would help to stailize short-term swings in financial markets by eliminating much of the mystery and uncertainty . . ."

Hearings at 277.

Professor David H. Pyle of the University of California at Berkeley expressed a preference for release of "a record of policy action on the day after each meeting." Hearings at 299. He explained that delay "may provide economic advantages to those institutions which deal directly with the Open Market Desk." Hearings at 300. Professor Pyle pointed to the immediate release of Department of Agriculture crop reports and noted that "strong market responses to the new information in crop reports . . . do not appear to be destablizing in the commodities futures markets." Id.

Professor William Poole of Brown University advised the Committee that he favored "very rapid release" of information on policy actions "[i]n contrast to my recommendation for de-

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(footnote continued from page 38)
Inc. expressed agreement with Professor Friedman. Hearings at 270.

layed release of policy deliberations." Hearings at 238. 15/ He also noted the danger of profiteering from "inside information" so long as the records are not promptly released. Id. 16/

15/ Former Governor Maisel also wrote to the Subcommittee summarizing the views he had expressed in his book, quoted supra 35-36. See Hearings at 225. Like Professor Poole, Mr. Maisel favored a substantial delay in making public the Memoranda of Discussion at the FOMC meetings, in contrast to the policy directive which, he wrote, should be available on the close of the day the FOMC meets and adopts it. Id. See also Hearings at 228 (Professor James Meigs); Hearings at 252 (Professor Peter Temin); Hearings at 279 (Professor Richard Sylla).

16/ Professor Poole's letter continued as follows:

> For example, if the IRS interprets a new regulation in a particular way, then the information should be available to everyone and not just to the particular taxpayer whose case led to the interpretation; the same argument obviously applies to most bank regulatory actions by the Federal Reserve. Id.

Dr. William Gibson, Vice President and Director of Monetary Affairs of Smith, Barney, Harris Upham & Co., an investment banking firm, made a telling point in his letter to the Committee, noting that by the time the 30 day delay period has expired, "virtually everyone who follows markets closely knows what the Committee's policy has been." Hearings at 204.

Dr. Gibson's comments serve to emphasize the conflict between the FOMC's refusal promptly to announce their current policy directive and the statutory scheme of the Freedom of Information Act. The Act is designed to put all private citizens on an equal footing with respect to access to recorded government policies. Even assuming absolute secrecy were a wise policy in the case of the records at issue, the policy cannot be enforced because market experts divine the current FOMC policy before it is made public and profit from their expertise. Since the Freedom of Information Act has as one of its premises that all citizens should have access to the same agency policies at the same time, prompt release of the records at issue supports one of the Act's primary policies.

In recent years, the enormous impact of the FOMC's operations on money supply and interest rates has become a matter of common knowledge and of wide public interest. Financial

writers closely follow the actions of the FOMC and seem able to discern the FOMC policy decisions far in advance of their official release. For example, referring to the FOMC's policy of delayed disclosure of policy decisions, Edwin L. Dale wrote in the New York Times on May 25, 1976:

> Judging from what has happened in the money market in the last few days [tightening of monetary policy], a further step in that direction was probably taken at the committee's meeting last Tuesday, although a summary of that meeting will not be released until mid-June.

New York Times, May 25, 1976, at 47, col.5

On April 20, 1978, John H. Allan wrote in his Financial Column:

> The Federal Reserve in a surprise move, appeared to tighten monetary policy yesterday, raising interest rates and pushing bond prices down sharply.

New York Times, Apr. 20, 1978, § D, at 1, col. 2.

United Press International reported on July 19, 1978:

> The Fed's Open Market Committee met in Washington yesterday to set policy. Although results won't be published for 45 (sic) days, money market actions sometimes indicate what the committee decided.

Washington Post, July 19, 1978, § D, at 1, col. 3.

Thus the financial press realizes the widespread public interest in what the FOMC is doing and the experts frequently are able to divine the FOMC moves before they are made public. Meanwhile, as former Governor Maisel points out in his scholarly book, the insiders follow the operations of the manager of the Open Market Account in buying and selling securities and profit from the delay in releasing the information to the public at large.

We submit that the disagreement among the experts as to the effect of the FOMC disclosure policies serves to emphasize the wisdom of Congress in phrasing the exemptions in the FOIA so as to minimize the extent to which the courts must balance competing policy arguments. Where the Congress intended

the courts to have a role balancing competing interests in disclosure, it specifically so provided. Exemption 6, for example, requires the courts to balance the policy against invasions of personal privacy against the policy of disclosure of agency records. See Department of the Air Force v. Rose, 425 U.S. 352, 372-73 (1976). Congress gave the courts no such responsibility in construing Exemption 5. It must be remembered we are here dealing with open market operations in a law suit seeking to enforce a statute designed to provide "access to official information long shielded unnecessarily from public view." Environmental Protection Agency v. Mink, 410 U.S. 73, 80 (1973). "[D]isclosure, not secrecy, is the dominant objective of the Act." Rose, supra, 425 U.S. 352, 361 (1976).

The court below ended its opinion by inviting Congress to consider changes in the Act should it determine that prompt publication of the records sought here could impede implementation of the national monetary policy. Petition for Cert. 18A. The suggestion was a wise one. We respectfully submit that this Court is not the proper forum before which to seek the resolution of the conflict of opinions between the FOMC and experts outside that agency. Congress is the appropriate body to weigh the merits of the arguments regarding disclosure and, if it finds the FOMC's position persuasive, it should amend the FOIA to exempt the policy decisions from prompt disclosure. In fact, following

the decision in the court of appeals below, Senator Proxmire on January 25, 1978 introduced a bill by request that would defer publication of the FOMC Domestic Policy Directives. S. 2427, 95th Cong., 2d Sess. (1978). No action has yet been taken by the Senate Committee considering the bill.

The suggestion of the court of appeals that the FOMC's arguments should be addressed to the Congress and not to this Court is especially persuasive because of the limited scope allowed for judicial discretion by the framers of the FOIA. In interpreting the Freedom of Information Act the role of the courts is not similar to their role either in constitutional exegesis or in statutes like the Sherman Act whose terms, as this Court said many years ago, have "a generality and adaptability comparable to that found to be desirable in constitutional provisions." Hughes, C.J., for the Court in Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933). To the contrary, the provisions of the Freedom of Information Act are quite detailed and reasonably precise. Both courts below held that the records in question were of the type required by Subsection (a)(2) of the Act to be made publicly available promptly and were not covered by Exemption 5. As this Court's opinion last June in National Labor Relations Board v. Robbins Tire & Rubber Co., 98 Sup. Ct. 2311, 2316 (1978) observed, "Congress carefully

structured nine exemptions from the otherwise mandatory disclosure requirements" of the FOIA. Thus, there is now no longer room for argument that any court has discretion to authorize agency delay in making records not covered by any exemption promptly available for public inspection.

We therefore believe that the policy arguments on which petitioner relies here should be addressed to the Congress for its consideration and decision. As this Court said last June in rejecting arguments that it interpret the Endangered Species Act "reasonably",

> We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. Congress has spoken in the plainest of words . . . .

Tennessee Valley Authority v. Hill, 98 Sup. Ct. 2279, 2301-02 (1978). Here too, Congress has spoken in "the plainest of words", and this Court has no mandate to strike a balance of equities. The Freedom of Information requires the FOMC to publish its statements of policy without delay, and that agency should be required by this Court to comply with the requirement of that Act.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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